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STEVEN M GREENBERG
CHRISTOPHER & WEISBERG P.A.
200 EAST LAS OLAS BOULEVARD
SUITE 2040
FORT LAUDERDALE, FL 33301

EXAMINER

NOVOSAD, JENNIFER ELEANORE

| ART UNIT | PAPER NUMBER |
|----------|--------------|
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3634

DATE MAILED: 05/13/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/613,486

Applicant(s)

MUELLER ET AL.

Examiner

Jennifer E. Novosad

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 March 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-7 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-7 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

This final Office action is in response to the amendment filed March 14, 2005 by which claims 1-3, 6, and 7 were amended.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1 and 7 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claims contain subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The limitation "said stacking surface and support surface supporting a vertical stacking of articles of manufacture without assistance from other support structures" in lines 7-8 of claim 1 and lines 6-7 of claim 7 lacks proper support in the original specification (including the original claims and drawings). *In particular*, it would not be reasonably conveyed to one of ordinary skill in the art that the (stacking and support) surfaces could support articles "without assistance from other support structures". *For example*, what about the "support structure" of a counter, or rack, or shelf, or the floor, on which the lowest article or even the lowest stacking device is placed? Does such a surface not act as a "support structure" which assists in supporting the stack of articles? *In fact*, in Figure 3, it can be seen that the wire mesh shelf (330), i.e., which constitutes an "other support structure" by the examiner, is assisting in the support of the articles.

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Thus, not only is this newly added limitation lacking proper support in the original disclosure, this newly added limitation in the claims is actually contrary thereto.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1 and 7 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The recitation "supporting" in line 7 of claim 1 and line 6 of claim 7 renders the claims indefinite since this *positive* limitation improperly seeks to link functionally recited structure, i.e., the vertical stacking of articles, to positively recited structure, i.e., the surfaces. It is noted that if the articles are not being positively claimed, a functional phrase or recitation, such as --adapted to support-- should be used to link the two structures together.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 4,688,684 (Young *et al.* '684).

Young *et al.* '684 disclose a generally circular stacking device (13) comprising a stacking surface (14) having a configuration *for supporting an article stacked thereon* and a support

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surface (17) opposite the stacking surface (14) *for direct communication* (see Figure 3) with an article below the support surface (17). With respect to the limitation "said stacking surface and support surface supporting a vertical stacking of articles of manufacture without assistance from other support structures" in lines 7-8 of claim 1, *in view of the Section 112, 1st paragraph rejection advanced above*, it is noted that the additional elements, such as 10 and 11 in Young *et al.* '864, are considered by the examiner to define "mounting elements", not "other support structures", as recited in the claim. It is also noted that the claim does not require a function of the "other support structures". *Accordingly*, the structure of the Young *et al.* is considered to meet the limitations of the claim.

Claims 1, 2, and 7 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,845,791 (Kawolics '791).

Kawolics '791 discloses a stacking system comprising a plurality of different shaped polygonal stacking devices (see Figures 7-9) whereby each device comprises a stacking surface (top, upper surface area, e.g., as viewed in Figures 7-9) *for supporting an article stacked thereon* and an opposite support surface *for direct communication* with an article disposed below (see Figure 6). With respect to the limitation "said stacking surface and support surface supporting a vertical stacking of articles of manufacture without assistance from other support structures" in lines 7-8 of claim 1 and lines 6-7 of claim 7, *in view of the Section 112, 1st paragraph rejection advanced above*, it is noted that the additional element, such as 12 in Kawolics '791, is considered by the examiner to define a "mounting element", not "other support structures", as recited in the claim. It is also noted that the claim does not require a function of the "other

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support structures". *Accordingly*, the structure of the Kawolics is considered to meet the limitations of the claim.

Claims 1 and 2 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent 2,172,013 (Parry '013).

Parry '013 discloses a polygonal shaped device (9) having a stacking surface (top, upper surface area of 17) *for supporting an article stacked thereon* and an opposite support surface *for direct communication* with an article disposed below. With respect to the limitation "said stacking surface and support surface supporting a vertical stacking of articles of manufacture without assistance from other support structures" in lines 7-8 of claim 1, *in view of the Section 112, 1st paragraph rejection advanced above*, it is noted that the additional elements, such as 5 and 6 in Parry '013, are considered by the examiner to define "mounting elements", not "other support structures", as recited in the claim. It is also noted that the claim does not require a function of the "other support structures". *Accordingly*, the structure of the Parry is considered to meet the limitations of the claim.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3, 4, and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Young *et al.* '684, alone.

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Young *et al.* '684 disclose the device as advanced above.

The claims differ from Young *et al.* '684 in requiring: (a) the support surface to comprise an ellipse (claim 3), (b) the surfaces to comprise a machine washable material (claim 4), and (c) support surface has a configuration for direct communication with a wire mesh shelf (claim 6).

With respect to (a), it would have been an obvious design choice to one of ordinary skill in the art at the time the invention was made to have fabricated the device in the shape of an ellipse for increased aesthetic appeal.

With respect to (b), although Young *et al.* '684 do not disclose the material from which the surfaces are made, it would have been an obvious design choice to one of ordinary skill in the art at the time the invention was made to have fabricated the surfaces of a machine washable material, since the surfaces support bottles comprising liquids which would have to be washed away if spilt on the surfaces (14, 17) of the device, thereby increasing ease in use to the consumer.

With respect to (c), it would have been obvious to one of ordinary skill in the art at the time the invention was made that a wire mesh shelf could be used with the device, thereby increasing storage capabilities of the device. It is noted that the claim is not positively requiring a wire mesh shelf, but rather use therewith. *Accordingly*, a reference need only be capable of being used with such a shelf in order to meet the language of the claim. *Thus*, the structure of Young *et al.* is considered to be capable of being used with a wire mesh shelf.

Claims 3, 4, and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kawolics '791, alone.

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The claims differ from Kawolics '791 in requiring: (a) the support surface to comprise an ellipse (claim 3), (b) the surfaces to comprise a machine washable material (claim 4), and (c) support surface has a configuration for direct communication with a wire mesh shelf (claim 6).

With respect to (a), it would have been an obvious design choice to one of ordinary skill in the art at the time the invention was made to have fabricated the device of Figure 7 in the shape of an ellipse for increased aesthetic appeal.

With respect to (b), although Kawolics '791 does not disclose the material from which the surfaces are made, it would have been an obvious design choice to one of ordinary skill in the art at the time the invention was made to have fabricated the surfaces of a machine washable material, thereby increasing aesthetic appeal since the devices can be cleaned easily

With respect to (c), *it would have been obvious to one of ordinary skill in the art at the time the invention was made that a wire mesh shelf could be stored on the device, thereby increasing storage capabilities of the device.* It is noted that the claim is not positively requiring a wire mesh shelf, but rather use therewith. *Accordingly*, a reference need only be capable of being used with such a shelf in order to meet the language of the claim. *Thus*, the structure of Kawolics is considered to be capable of being used with a wire mesh shelf.

Claims 4 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Parry '013, alone.

Parry '013 discloses the device as advanced above.

The claims differ from Parry '013 in requiring: (a) the surfaces to comprise a machine washable material (claim 4), and (b) the surfaces to comprise a heat resistant material (claim 5).

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With respect to (a), although Parry '013 does not explicitly state that the surfaces are comprised of a washable material, it would have been an obvious design choice to one of ordinary skill in the art at the time the invention was made to have fabricated the surfaces from such a material, since the assembly holds food items, thereby increasing sanitary conditions.

With respect to (b), although Parry '013 does not recite that the surfaces are made from a heat resistant material, it would have been an obvious design choice to one of ordinary skill in the art at the time the invention was made to have fabricated the surfaces from such a material, since the assembly holds hot food items, thereby increasing safety to a user.

Response to Arguments

Applicant's arguments filed March 14, 2005 have been fully considered but they are not persuasive. *Firstly*, it is noted that the examiner has (as advanced above) discussed the newly added recitation "said stacking surface and support surface supporting a vertical stacking of articles of manufacture without assistance from other support structures".

Applicant's arguments regarding (a) "the normal force" (see the second paragraph on page 6), (b) "legs, columns, braces or poles" (see the second paragraph on page 6), (c) "avoids the use of a vertical support structure" (see the second full paragraph on page 7), and (d) "legless nature" (at the bottom of page 7), are acknowledged. *However*, these arguments are considered to be more limiting than what is actually being claimed and therefore are not commensurate with the scope of the claims since the claims do not use or recite these phrases therein.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jennifer E. Novosad whose telephone number is 571-272-6832. The examiner can normally be reached on Monday-Thursday, 5:30am-4:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carl D. Friedman can be reached on 571-272-6842. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Jennifer E. Novosad/jen
May 3, 2005

A handwritten signature in black ink, appearing to read 'C. Friedman', with a long horizontal stroke extending to the right.

Carl D. Friedman
Supervisory Patent Examiner
Group 3600